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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 862.

MEMPHIS TRANSIT COMPANY,
Petitioner,

vs.

STATE OF TENNESSEE, on Relation of W. M. LEECH,
Commissioner of Highways and Public Works,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

This cause was commenced in the Chancery Court of Davidson County, Tennessee, between the State of Tennessee, on relation of W. M. Leech, the Commissioner of Highways and Public Works of Tennessee (hereafter referred to as the "Commissioner"), against Southern Bell Telephone and Telegraph Company (hereafter referred

to as "Southern Bell"). The Petitioner, Memphis Transit Company, is one of more than fifty intervenors who were authorized by the Chancellor to intervene in the cause for the purpose of testifying the constitutionality of Chapter 170 of the Public Acts of 1957 (Sections 54-543-545, Tennessee Code Annotated).[1] All of the constitutional issues raised by the original bill seeking a declaratory judgment involved the Constitution of Tennessee. The basic issue was whether the State's General Assembly could constitutionally enact legislation which provided (a) for the State to reimburse utilities for the relocation of the facilities located on publicly owned rights of way when necessary due to the construction of interstate highways, and, (b) for the reimbursement of utilities for the relocation of utility facilities located on publicly owned rights of way when necessary due to the construction of any highway project built with federal aid funds, provided that the utility showed (1) hardship to the extent that its financial structure became impaired, or (2) its rates were increased as a result of bearing the costs of relocation, and (c) in the event of disagreement between the Commissioner of Highways and any utility, as to whether the utility was entitled to reimbursement under Sections 1 and 2, arbitration was provided for certain controversies. In attacking the constitutionality of this legislation, the Commissioner sought a declaration of his rights, duties and interests therein. The bill alleged that the legislation was unconstitutional violating Article II, Section 31, of the Constitution of Tennessee,[2] which forbids the use of the State's credit to or in aid of corporations and others; Article XI, Section 8, of the Constitution of Tennessee, which prohibits unreasonable legislative classifications, laws favoring individuals, and laws granting rights, im-

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1 Copied in Appendix A as codified.

2 Copied in Appendix B. Since the Court did not find it necessary to construe the other State constitutional provisions, they are not copied.

munities, privileges, or exemptions; Article I, Section 17, of the Constitution of Tennessee, which prohibits suits against the State, and Article I, Section 20, of the Constitution of Tennessee, which prevents the impairment of contracts. The bill, as amended, also alleged that the act was void for indefiniteness.

The original defendant, Southern Bell, answered the bill and the Chancellor permitted numerous private corporations, individuals, municipalities and cooperatives to intervene. They filed demurrers and Southern Bell applied for and was granted leave to withdraw its answer and file a demurrer. The intervenors were permitted to intervene for the sole purpose of participating as to the constitutional issues. Generally, the demurrers denied that Chapter 170 of the Public Acts of 1957 was invalid or unconstitutional for the reasons alleged in the bill. In addition, some of the demurrers challenged the right of the Commissioner to maintain the suit.

Alleging a justiciable controversy between the State and Southern Bell, the bill averred that there were two interstate highway projects located in Giles County, Tennessee, involving the reconstruction of a former state highway upon the right of way of which Southern Bell had installed its facilities, including poles, wires, anchors and conduits under Sections 65-2105-6, Tennessee Code Annotated. This was the only controversy alleged in the bill.

The learned Chancellor held that the Commissioner was authorized to institute and maintain the suit, but otherwise sustained the demurrers, declaring Chapter 170 of the Public Acts of 1957 valid and constitutional. The State appealed from the decree of the Chancellor to the Supreme Court of Tennessee. The opinion of the State Supreme Court is reported at 319 S. W. 2d 90. A majority of the Court held that Chapter 170 of the Public Acts of 1957 violated Article II, Section 31, of the Constitution of Ten-

nessee, and reversed the decree of the Chancellor, except as to the authority of the Commissioner to maintain the suit. The majority held that utilities which install facilities on State highway rights of way by the authority of the State statute obtain no property rights and the use of the rights of way are purely permissive. In finding that the legislation offended the State Constitution, the Court declared:

> "We think that the basic test under this Section of our Constitution is whether the expenditure is for a State purpose. In the present case the primary purpose served by the expenditure is for the convenience and benefit of the utility, the purpose cannot be public."

The dissenting opinion held that the expenditures authorized by Chapter 170 of the Public Acts of 1957 were for a public purpose and, therefore, did not violate Article II, Section 31, of the Constitution of Tennessee.

The appellees, Southern Bell, and the Intervenors, filed timely petitions for re-hearing and a re-hearing was granted. Since the Chief Justice did not participate in the first hearing, the cause was set for re-argument and the majority adhered to the original decision, overruling the petitions to re-hear. A concurring opinion was filed by two of the majority and separate dissents were filed by two members of the Court. Thereafter, the Court permitted the Petitioner, Memphis Transit Company, to file a second petition to re-hear. The second petition to re-hear alleged that its properties would be confiscated under the majority decision. In overruling the second petition, the majority of the Court held that the rights of the utilities in publicly owned rights of way were purely permissive and, therefore, there could be no issue as to confiscation under the 5th and 14th amendments to the Constitution of the United States.

JURISDICTION.

The Petitioner alleges that jurisdiction is vested in this Court by virtue of 28 U. S. C. A. 1257 (3). The Petitioner has quoted Subsection 3: "(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, **or where any title, right, privileges, or immunity is specially set up or claimed, under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States**" (Emphasis as supplied by the Petitioner).

There could not be any issue as to the repugnancy of the State statute to the Federal Constitution, and consequently, the Petitioner appears to claim some title, right, privilege or immunity under the Constitution of the United States. In other words, as the contention is understood by the respondent, the Petitioner contends that it has a "title, right, privilege or immunity" in Chapter 170 of the Public Acts of 1957, as enacted by the General Assembly of Tennessee, and the Federal Constitution guarantees to the Petitioner the benefit of the statute, although the Supreme Court of Tennessee has held that the statute violates the State Constitution. This is indeed a novel doctrine and the State respectfully insists that 28 U. S. C. A. 1257 (3) does not give this Court jurisdiction of such questions.

To the contrary, the state contends that subsection 3 was never intended to clothe this Court with jurisdiction of a question of this character. The decisions of this Court are adverse to the position of the Petitioner. In **Leeper v. State of Texas (Tex. 1891), 139 U. S. 462, 11 S. Ct. 577, 35 L. Ed. 225**, the purpose and effect of the statute was discussed and the Court opined:

> "That whether the statutes of a legislature of a state have been duly enacted in accordance with the requirements of the constitution of such state is not a federal question, and the decision of state courts as to what are laws of the state is binding upon the courts of the United States." (Citing cases.)

The rule has long been recognized that the State Courts have the absolute power and authority to adjudicate the common law of the State and to construe statutes of the State and the State Constitution. However, we quote the unequivocating language used by Mr. Justice Cardozo, who, in **Highland Farms Dairy, Inc., v. Agnew (Va. 1937), 300 U. S. 608, 57 S. Ct. 549,** wrote for the Court,

> "A judgment by the highest Court of a state as to the meaning and effect of its own Constitution is decisive and controlling everywhere."

The Petitioner has failed to point out why this Court should assume jurisdiction under 28 U. S. C. A. 1257 (3), and has failed to show to the Court, as he must do under the statute, the specific " . . . title, right, privilege or immunity . . . " which is claimed under the Fifth and Fourteenth Amendments of the Constitution of the United States. Jurisdiction cannot be assumed on the basis of vague and indefinite allegations.

The statute confers jurisdiction where a statute is challenged as being invalid because it is repugnant to the Constitution, treaties or laws of the United States. In declaring the legislative policy as to the appellate jurisdiction of this Court, Congress carefully avoided giving jurisdiction to this Court where the State statutes are declared unconstitutional under a State Constitution. The congressional policy is important because in failing to confer jurisdiction in this class of cases, Congress intended that these questions should be resolved locally in the State Courts.

Therefore the State contends that the Petitioner has not only failed to allege a substantial federal question, but has not even raised a federal question.

The State also insists that the opinion of the Supreme Court of Tennessee rests upon an adequate and independent non-federal ground and this Court is without jurisdiction. **Black v. Cutter Laboratories (Cal. 1956), 351 U. S. 292, 76 S. Ct. 824; Herb v. Pitcairn (Ill. 1945), 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789; Enterprise Irrigating District v. Farmers Mutual Canal Company (Neb. 1917), 243 U. S. 157, 38 S. Ct. 318, 61 L. Ed. 644.**

Further, it is immaterial whether the decision of the State Court is right or wrong since there is no assertion that the State Court adopted its view of the non-federal question in order to evade a federal constitutional issue, and the State's decision has no relation to any federal question raised in the State Courts. **Enterprise Irrigating District v. Farmers Mutual Canal Company,** supra. There it is said that this Court is without power to disturb such a judgment.

Neither can the decision of the State Court be reviewed unless the non-federal ground is unfounded.

In **McCoy v. Shaw (Okla. 1928), 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891,** this Court declared,

> "It is settled law that a judgment of a State Court which is put upon a non-federal ground, independent of the federal question involved, and broad enough to sustain a judgment, **cannot be reviewed by this Court,** unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question." (Emphasis supplied.)

Although we think that the foregoing is sufficient to warrant the dismissal of the petition for certiorari, we invoke another rule of law to sustain the position of the respondent.

In the early case of **F. G. Oxley v. Butler County (Mo. 1897), 166 U. S. 58, 65, 17 S. Ct. 709, 41 L. Ed. 1149**, this Court in discussing whether a right claimed under a treaty could be asserted when the question was presented to the State Supreme Court on a petition to re-hear, which was overruled, observed that the jurisdictional averments respecting substantial federal rights cannot be the subject of inference.

When the case at bar is tested by the foregoing authorities, it is obvious that the Petitioner has failed to show that this Court has jurisdiction. It is elementary that the General Assembly of a State cannot enact legislation which is contrary to the State Constitution. It is equally elementary that the State Supreme Court is the final arbiter as to all questions involving the construction of the State Constitution, and the determination of the extent of the State legislative power under it. Significantly, the Petitioner has failed to point to any provision of the Federal Constitution which requires that the State enact a statute for the benefit and enrichment of the Petitioner. It has not only failed to do so, but could not.

The failure to allege a substantial federal question and to show jurisdiction in this Court as required by the law and the rules of this Court is fatal and the petition for the writ of certiorari should be dismissed.

QUESTIONS PRESENTED.

1. Can this Court require a State Court to construe a State statute as being constitutional and a valid State law when the State's highest judicial tribunal finds and de-

clares that the statute is contrary and repugnant to the State Constitution?

2. If this Court should answer the first question in the affirmative, will this Court reverse the State Supreme Court and require the State Courts to determine as a matter of fact as to whether the Petitioner's properties will be confiscated under the Fifth and Fourteenth Amendments where a justiciable controversy was not alleged in an action for a declaratory judgment in a State Court as between the Petitioner and the Respondent?

3. Does the Constitution of the United States guarantee the enactment of a State statute for the reimbursement of utilities which have installed their facilities upon publicly owned rights of way by permission of another State statute?

STATUTES INVOLVED.

The statutes involved are Sections 54-543-545, Tennessee Code Annotated (also designated as Chapter 170, Public Acts, 1957), and are copied in Appendi A.

STATEMENT OF THE CASE.

As indicated by the State Supreme Court, the facts alleged in the bill must be taken as true since they are before the Court on demurrer. The facts will be briefly summarized.

The relator is the chief administrative officer of the Department of Highways and Public Works. The Department plans, locates, acquires, constructs, and maintains a system of highways for the use and benefit of the citizens and taxpayers of the State, as well as the travelling public generally. Local, state, and federal funds, varying in amounts and proportions but all derived from taxation, are jointly used for State highway purposes. The Commis-

sioner is charged by law with the expenditure of these funds. Acting on behalf of the State, he let contracts for two interstate highway projects in Giles County. The rights of way of existing highways, on which Southern Bell operated and maintained a telephone line, including wires, poles and other fixtures, were involved in the projects. The rights of way where those facilities were located belonged to the State of Tennessee and it was necessary to remove the facilities so that the highway could be reconstructed. The Commissioner was advised by the officials of Southern Bell that the utility would not re-locate its facilities at its own expense so that the highway could be improved and reconstructed, unless the State agreed to reimburse the telephone company for the costs of such relocation.

Southern Bell is a New York Corporation operating a vast communication system for profit in Tennessee and a part of its facilities, including poles, wires, underground conduits and other equipment, are installed in, upon and over publicly owned rights of way, under Section 65-2105, Tennessee Code Annotated. The public rights of way have been acquired at the expense of the citizens and taxpayers of the State, and Southern Bell, as well as other privately and publicly owned utilities, have used and occupied such publicly owned rights of way without cost or expense to them.

On the 17th day of February, 1941, Southern Bell, for a valuable consideration, entered into a valid contract with the State Department of Highways agreeing to install, construct and maintain its facilities on publicly owned rights of way as directed by the department, and to re-locate its facilities at its own expense when necessary for the improvement and construction of highways. The company refused to honor its contract, although it had obligated itself to remove and re-locate its facilities from publicly owned rights of way at its own expense.

The State, in cooperation with the Federal Government, has undertaken what is known as the interstate highway program. In acquiring rights of way for interstate highways, the State must bear ten per cent and the Federal Government ninety per cent of the costs of acquisition, provided that such rights of way have been acquired in accordance with the terms and conditions of the Federal Highway Act (23 U. S. C. A. 101, et seq.). Under Section 3, Chapter 462, Public Law 627, 84th Congress, (now 23 U. S. C. A. 123), it is expressly provided that the Government cannot participate with its funds in paying utilities to re-locate their facilities installed on existing rights of way of state highways, incorporated into the interstate system, if such payment violates State law or a legal contract between the utilities and the State.

The demurrers also admit that the Eightieth General Assembly appropriated Five Million Dollars from the surplus accrued prior to January 1, 1957, in the State's General Fund to be expended immediately for matching federal funds, and, in addition, authorized the expenditure for highway purposes during the next biennium of ". . . such receipts of highway revenues as are now provided by law . . ." by virtue of Section 16, Chapter 105, Public Acts of 1957, and that certain bonds for highway purposes be issued during the 1957-1959 biennium.

In order to participate in the interstate highway program, it was necessary for the State to appropriate and raise large sums of money necessitating the enactment of Chapter 264, Public Acts of 1957, authorizing the State Funding Board to issue bonds in an amount not exceeding Thirty Million Dollars. The reasons for authorizing the bond issue were set out in the preamble of Chapter 264, Public Acts of 1957.

In this connection, it was averred that a part of the monies raised by the bond issue would be expended upon

the acquisition of rights of way, including the costs of re-locating utility facilities as provided by Chapter 170, Public Acts of 1957, in the pathway of the construction of interstate highways and other highways as contemplated by the Federal Highway Act.

The Department has estimated that the costs of relocating utility facilities in connection with interstate highway projects in Tennessee will amount to $15,370,000.00, being more than one-half of the amount which the General Assembly authorized the State to borrow for highway purposes under Chapter 264, Public Acts of 1957.

Further, the bill charged that the only authority for reimbursing utilities for the relocation of their facilities located on a highway right of way was Chapter 170, Public Acts of 1957, and prior to its enactment there was no obligation upon the State to expend its funds for this purpose.

The bill also asserted that the rights of utilities to install, construct and maintain their facilities on publicly owned rights of way is subordinate to the superior rights of the travelling public and the utilities must adjust and relocate their facilities at their own expense when they are located on publicly owned rights of way, if such facilities obstruct the construction, reconstruction or improvement of public highways.

The bill further charged, and was admitted by demurrer, that since the organization of the highway department the State has not expended its funds to pay for utility relocations when adjustments are required on account of State highway improvement projects and Southern Bell and other utilities have not demanded payments for more than sixty years until recently. The conduct of the State and the various utilities amounted to a contemporaneous and practical construction of the rights created under the statute and due to the long acquiescence of the State's

officials and the respective utilities, as well as the general public, and such conduct prevented the utilities from making a claim that a reimbursable right was created by the statute permitting them to go upon publicly owned rights of way. Due to the conduct of the parties over a long period of time and the contract entered into by Southern Bell, the company should be estopped to assert a reimbursable interest at this late date. Further, the Attorney General construed the rights granted under the Code Section as being permissive in nature and not creating a reimbursable right and interest as long ago as 1929.

The bill further averred that the Commissioner of Highways desired to perform the duties imposed upon him by the General Assembly, unless he was inhibited therefrom by the State Constitution, and that he was advised and believed, as did the State Attorney General, that Chapter 170, Public Acts of 1957, was unconstitutional and void, and, consequently, submitted his rights and interests to the Court seeking a declaration of the law. The bill as amended, challenged the constitutionality of Chapter 170 on the grounds that it violated Article II, Section 31; Article XI, Section 8; Article I, Section 20, and Article I, Section 17, of the Constitution of Tennessee. The bill also challenged Chapter 170 on the ground of indefiniteness.

ARGUMENT.

The Petitioner cites the cases of Nashville C. & St. L. Railway v. Walters (Tenn. 1935), 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949, and Zucht v. King (1922 Tex.), 260 U. S. 174, 177, 43 S. Ct. 24, 67 L. Ed. 194, as authority for this Court to entertain the petition and grant the writ of certiorari. We do not understand that either of these cases so holds.

The Nashville case is authority for the proposition that a State cannot arbitrarily require a railroad to bear fifty per cent of the cost of eliminating a grade crossing under a State Statute. In that case the State Supreme Court held that the statute was a valid exercise of the State's police power and hence constitutional. This Court reversed the State Court on the ground that the railroad's bill for a declaratory judgment showed that the action of the State was arbitrary.

By way of contrast, the State Supreme Court, in the instant case, has held that a State statute violates the State Constitution. There was no issue of fact alleged in the Trial Court between the State and the Petitioner showing unreasonable or arbitrary action. This must be true because the factual situation alleged concerned a controversy between the State and Southern Bell not the Memphis Transit Company. The facts contained in the State's bill for a declaratory judgment were not only the sole facts before the State Court as issues in this litigation, but since the intervenors elected to demur to the bill, the facts recited in the bill must be taken as true as pointed out by the majority opinion of the State Supreme Court. Therefore, the State insists that there is a marked distinction between this case and the Nashville case. Cf. Atchison T. & S. F. Railway Company v. Public Utilities Commission (1953 Cal.), 346 U. S. 346, 74 S. Ct. 92. In Atchison, the Court distinguished the Nashville case and held that the action of the California Public Utilities

Commission was neither arbitrary nor unreasonable under a California statute requiring a railroad company to bear certain costs of certain grade separation projects.

In Zucht, the Court dealt with the validity of a compulsory vaccination ordinance requiring children of school ages to be vaccinated. This Court dismissed the writ of error although it was asserted that there was an unconstitutional exercise of authority under a valid ordinance. It is difficult to understand how the Zucht case has any application whatever to the case at bar.

The Petitioner cites authorities in support of its contention that the majority opinion of the Tennessee Supreme Court is incorrect. This Court has repeatedly stated that it is not concerned with the correctness or incorrectness of decisions of State Courts based upon State law. In view of this Court's prior cases certiorari will not be granted merely because this Court may disagree with the result reached by the State Court or would have reached a different result.

In any event, before there could be confiscation there must be a taking of a property right. The universal rule is that a statute authorizing utilities to install their facilities in highway rights of way create no property rights and the rights of the utilities are subordinate to the superior rights of the travelling public. In discussing this proposition in State of Tennessee v. United States et al. (6 Cir. 1958), 256 F. 2d 244, 258, the opinion states,

> "The telephone line here in question was originally located by permission granted by State statute, and the law is well settled that a statutory, permissive right of use of highways by public utilities is subordinate to the rights of the public; that the original location of poles or other facilities in a public highway does not create an irrevocable right to have such poles and facilities remain forever in the same place; and that a utility company may be required to relocate

its lines at its own expense when such relocation is demanded by public necessity and for public safety and welfare."

In support of the rule, the Court cited and discussed numerous cases decided by this Court and the courts of last resort in other states (256 F. 2d 258-261). The authorities are in accord that there is not a taking of property under the Fifth and Fourteenth Amendments of the Federal Constitution when utilities are required to adjust their facilities at their own expense when necessitated by highway improvement programs. Hence, the Supreme Court of Tennessee correctly concluded that no problem of confiscation is presented.

The Petitioner, by way of argument, complains that an impossible financial burden will be imposed upon it if the State and Federal Governments do not pay the bill. In speculating as to dire consequences, the Petitioner foresees possible bankruptcy. As previously pointed out, these propositions are not based upon factual allegations which were issues in this lawsuit and pleaded in the Trial Court where the Petitioner chose to controvert the facts in the State's bill by demurrer. A complete answer to a similar insistence was given in Erie Railway Company v. Board of Public Utility Commissioners (N. J. 1921), 254 U. S. 394, 410-411, 41 S. Ct. 169, where the Court stated:

"It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. . . . If the burdens imposed are so great that the road cannot be run at

> a profit it can stop, whatever the misfortunes the stopping may produce. . . . Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty."

In keeping with the foregoing statements, the State would point out that the congress in authorizing the interstate highway program foresaw that it would be many years in completion. It is reasonable to assume that the State's officials will act providently in programing the construction of interstate highways in Memphis in such a way as to minimize the financial difficulty, if any, of the Petitioner. Although these are practical considerations, they are not controlling as to the legal or constitutional rights of the Petitioner.

In the summary of the petition, the importance of this litigation is stressed, declaring that this case ". . . is one of the most important legal cases of this decade . . ." However, the claims asserted do not affect state and federal relationships, and are not shown to be of such public importance as to affect generally the citizens of the United States. Instead, according to the Petitioner, only the citizens of Tennessee and New Mexico have a direct interest in the decisions of the Courts of those states. Litigants generally attach importance to lawsuits involving their rights but that must not mean that their rights, on that account, must be given special or preferred treatment under the law. The taxpayers of the State and nation are entitled to at least the same consideration as other litigants, and this case is of equal importance to them. It is far more important to all of the citizens of Tennessee that the State Constitution be championed and realistically construed by its Supreme Court than for the Memphis Transit Company to be unjustly enriched by grants from the public treasury in a manner contrary to the expressed intent and purpose of Article II, Section 31, of the Constitution of Tennessee.

Finally, the State would re-emphasize that it was never intended for this Court to assume jurisdiction of a case decided by a State Court and founded on State law in which the State Supreme Court declared that a State Statute violated the State Constitution. If the Congress had intended that this Court have such jurisdiction, surely it would have so stated in clear language in 28 U. S. C. A. 1257 (3). Although this section has been a part of the Federal law for many years, it has not been given the construction contended for by the Petitioner, but has been construed to the contrary. We must respectfully disagree with the Petitioner's insistence that this Court has jurisdiction.

CONCLUSION.

In conclusion, the State respectfully insists that the petition for the writ of certiorari should be dismissed for the reasons herein stated and the judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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APPENDIX A.

Code Sections of Tennessee Code Annotated.

54-543. Whenever the construction of any project on the interstate system of highways, as defined and provided for by the Federal-Aid Highway Act of 1956, being Public Law 627, eighty-fourth congress, second session, including extensions thereof in urban areas, with state and federal funds, shall necessitate the relocation of any utility facilities, as referred to in section 111 of said Federal-Aid Highway Act of 1956 (U. S. C., title 23, sec. 162), whether heretofore or hereafter constructed, the utility owning or operating such facility shall relocate the same upon order of the commissioner of highways and public works; provided, however, that the cost of relocation shall not be deemed a right-of-way cost to be paid in whole or in part by any county or municipality, but is hereby declared to be a part of the cost of the construction of such project and the same shall be paid by the state, after the utility has furnished it with all papers, records, or supporting documents required by the federal government, out of such funds then or thereafter available for such highway construction, in accordance with the provision of section 111 of said Federal-Aid Highway Act of 1956.

Provided, however, the state may by force account or contract relocate such facilities, or, as an alternative, shall have the right to require the utility owning or operating such facility to relocate the same in which event the state shall reimburse such utility for the cost or relocation in accordance with subsection (c), section 111, of said Federal-Aid Highway Act of 1956; provided further, however, in the event the utility and the state are unable to agree as to the cost of such relocation, the question may be arbitrated as hereinafter set out (Acts 1957, ch. 170, § 1).

54-544. Whenever the construction of any project on the federal-aid primary or secondary system of highways, as defined and provided for by the Federal-Aid Highway Act, of 1956, being Public Law 627, eighty-fourth congress,

second session, including extensions thereof into urban areas, with state and federal funds, shall necessitate the relocation of any utility facility, as referred to in section 111 of said Federal-Aid Highway Act of 1956 (U. S. C., title 23, sec. 162), located upon a publicly owned right-of-way and not upon a right-of-way owned by such utility, whether heretofore or hereafter constructed, the utility owning or operating such facility shall relocate the same upon order of the commissioner of highways and public works at its own expense and the utility may after such relocation make a claim to the commissioner of highways and public works for reimbursement. The commissioner is authorized and empowered to determine whether such costs, if paid by the utility, will result in undue hardship on the utility to the extent that its financial structure shall be substantially impaired or its rates subjected to an increase as a result of said relocation cost. If he finds such an impairment in the financial structure of the utility, the state shall reimburse the utility from such state and federal aid funds in such amount as the commissioner may deem appropriate but not more than provided for by subsection (c), section 111, of said Federal-Aid Highway Act of 1956 (Acts 1957, ch. 170, § 2).

54-545. In the event any utility and the commissioner of highways and public works are unable to agree on the cost of relocating facilities as provided for in § 54-543, or in the event the commissioner of highways and public works and any utility are unable to agree upon whether or not the claim of a utility as provided by § 54-544 shall be paid, such utility and the state, through the commissioner of highways and public works, shall submit the question in controversy to arbitration under the provisions of § 23-502 et seq., and the award of the arbitrators shall be final and binding upon the parties. This section shall not apply to relocation made by force account or under a contract by the department of highways and public works (Acts 1957, ch. 170, § 3).

APPENDIX B.

Constitution of Tennessee, Article II,

Sec. 31. The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation or municipality: nor shall the State become the owner in whole or in part of any bank or stockholder with others in any association, company, corporation or municipality.